Leveson Inquiry – written statement by the Lord Chancellor and Secretary of State for Justice, Rt Hon Kenneth Clarke QC MP

Question 1. Who I am and brief summary of career history

1. I am Kenneth Clarke QC MP, the Lord Chancellor and Secretary of State for Justice.

2. I was elected Member of Parliament for Rushcliffe in 1970. I first entered Cabinet as the Paymaster General and Minister for Employment (September 1985 to June 1987). I was then Chancellor of the Duchy of Lancaster and Minister for Trade & Industry, (June 1987 to July 1988); Secretary of State for Health (July 1988 to November 1990); Secretary of State for Education and Science (November 1990 to April 1992); Home Secretary (April 1992 to May 1993); and Chancellor of the Exchequer (May 1993 to May 1997).

3. I was Shadow Secretary of State for Business between January 2009 and May 2010. I was appointed Lord Chancellor and Justice Secretary in May 2010. I have also been Non-Executive Director of Independent Newspapers (UK) Ltd, 28 October 1999 to 31 December 2009 and of Independent News and Media PLC, 14 June 2007 to 31 December 2009.

Question 2. Please assist the Inquiry by setting out as fully as possible the extent to which your current policy and operational responsibilities have a particular bearing on the conduct and business interests of the media. The Inquiry is particularly interested in the following areas, but there may be others:

a) any relevant aspects of the substantive civil law, for example relating to freedom of expression, privacy, defamation, freedom of information and data protection;

4. As Secretary of State for Justice I have responsibility for a range of substantive civil law and policy that may have a bearing on the conduct and business interests of the media. This includes:

- The Human Rights Act 1998;
- The Data Protection Act 1998;
- The Freedom of Information Act 2000;
- Defamation and the law of privacy (insofar as it exists as a development of the doctrine of breach of confidence in tort law); and
- The reduction of the time period after which historical records are released from 30 to 20 years.
- Conditional Fee Agreement reform

Attached at Annex A to this statement is a list of these Acts or policy areas with a fuller explanation of the particular provisions relevant to the Inquiry's interests (including specific powers and responsibilities I can exercise or have as Secretary of State).

b) any relevant aspects of the substantive criminal law, for example relating to any aspect of the unlawful obtaining of information whether for payment or otherwise, and the availability of public interest defences;

5. I have policy responsibility for a large part of the substantive criminal law. This includes bribery and corruption, offences in connection with the administration of justice, general offences in relation to (e.g.) fraud, official secrets and theft, as well as secondary criminal liability (aiding and abetting, attempts, etc). That does not extend to police powers or aspects of serious crime. Attached at Annex B to this statement is a fuller explanation of the specific provisions or elements that are likely to be most relevant to the Inquiry's interests, particularly in respect of the unlawful obtaining of information and the availability of public interest defences.

c) any relevant aspects of the rules relating to criminal or civil procedure or the conduct and funding of litigation, for example in relation to defamation proceedings, the reporting of proceedings or the disclosure of journalists' sources;

Conditional Fee Agreements (CFA)

6. I have the policy lead in Government on 'no win no fee' conditional fee agreements (CFAs), where we have been seeking to introduce reform across the whole field of civil law.

7. There is widespread concern that the ability to bring cases at no risk to the claimant, plus the disproportionate costs which CFA actions create, has

resulted in unnecessary litigation, and meant that defendants have sometimes been reluctant to defend cases even when they know they are in the right for fear of the punitive costs they will face if they lose. This is as much the case in defamation proceedings, which obviously directly affect the media industry, as it is across other areas of civil law.

8. I am therefore implementing the main recommendations contained in Lord Justice Jackson's Review of Civil Litigation Costs. The main element of the reform is to abolish the recovery of success fees and 'after the event' (ATE) insurance premiums from the losing side. This means that, under a reformed CFA regime, the success fee and any related insurance costs would have to be paid by the party who took out the CFA. The fee will be capped at 25% of general damages, which will subject to a 10% uplift. The overall aims is to rebalance the CFA regime to make it fairer for defendants who are at the receiving end of claims, and to reduce the substantial additional costs that they have to pay under the current regime by ensuring that claimants have an incentive to keep an eye on their costs.

9. Nothing in these reforms will prevent CFAs continuing to be available for strong cases. The Defamation Bill and the procedural reforms we are taking forward with it will reduce the complexity and expense involved in these cases. To do that, the Government is looking at the rules on costs protection for defamation and privacy proceedings for when our defamation reforms come into effect.

Reporting restrictions

10. I am also responsible for policy and legislation on a range of court procedure issues of direct relevance to the media. These include trials held in camera

(clearing the court of public or media), the giving of anonymous evidence, reporting restrictions, and contempt of court.

11. I am responsible for approving Rules developed by the Criminal Procedure Rule Committee which relate to these and other areas, though the Rules are made by the Committee itself. A recent example is my approval of the revision of Part 16 of the Criminal Procedure Rules, which deals specifically with reporting restrictions. Following a consultation by the Lord Chief Justice and consultation between the Committee and the media, the revised Part 16 now allows the media to communicate directly by electronic means from the courtroom without the need for an application to the court. This has, for example, paved the way for the use of Twitter by court reporters. In all these areas, I work in close consultation with the Attorney General.

12. Super-injunctions and anonymity injunctions, which have a clear and well-publicised impact on the ability of the media to report on court cases, are subject to the same procedural Rules that apply to other forms of injunction granted in civil proceedings. The Master of the Rolls' report, published in May 2011, also provided detailed guidance in relation to the practice and procedure to be followed by the courts in considering applications for super-injunctions and anonymity injunctions. I enclose this report as exhibit KC/1.

13. Though relating to police investigations (a matter primarily for the Home Secretary), the Inquiry might note the particular procedural provision made by Schedule 1 to the Police and Criminal Evidence Act 1984. That permits a magistrates' court to grant a warrant for search and seizure in relation to material, including certain journalistic material, which is considered to be likely to be of substantial value to the investigation of an indictable offence.

Broadcasting in Courts

14. I am the Secretary of State with responsibility for Her Majesty's Courts and Tribunals Service in England and Wales. The broadcasting of image and sound recordings from courts (except the UK Supreme Court) is prohibited. The broadcast media in particular have an interest in proposals to allow broadcasting of court proceedings, and have publicly called for a change to the current ban.

15. I announced in September 2011 plans to allow broadcasting of court proceedings in limited circumstances. The main broadcasters (BBC, ITN and BSkyB) have agreed to cover the costs of court broadcasting to ensure there is no impact on the public purse. Initially, broadcasting will be allowed of judgments and advocates' arguments in the Court of Appeal. I plan to introduce primary legislation as soon as Parliamentary time allows lifting the current bans on broadcasting in court, subject to conditions which will be set out in secondary legislation.

Transparency in Family Proceedings

16. I am also working to improve openness and transparency in family proceedings where it is in the public interest to do so. The debate on this issue has been long running. In 2008, a concerted campaign series by The Times newspaper questioned whether the restrictions on access and reporting could continue to be justified.

17. In October 2011, the Government agreed with the concerns raised by the Justice Select Committee Inquiry into the Operation of the Family Courts, and announced that the provisions in the Children, Schools and Families Act 2010, which would have allowed for greater reporting of family proceedings, should not be brought into force.

18. I have committed to looking afresh at the issue of openness in the family courts, taking into account the findings from the Family Courts Information Pilot, which has published 165 anonymised family judgments on a public website (http://www.bailii.org/databases.html#ew).

d) the functions, resourcing and performance of the Information Commissioner's Office (ICO).

19. Information on the general functions, resourcing and performance of the Information Commissioner's Office (ICO) can be found in the Framework Agreement between the Ministry of Justice and ICO which took effect from the 15 September 2011. This notes that as Secretary of State for Justice I will answer for the ICO in Parliament given my department's sponsorship responsibilities for the ICO. It is worth adding however that the ICO may be and has been called in its own right to give evidence before Parliamentary Select Committees. The Framework Agreement is enclosed with this statement as exhibit KC/2).

20. In respect of how the functions, resourcing and performance of the ICO relate to the conduct and business interests of the media, the answers provided to the Inquiry in the first witness statement (section 6) of the current Information Commissioner comprehensively cover this issue. The section on the Data

Protection Act 1998 in Annex A to this statement provides some additional information which I hope the Inquiry will find useful.

21. The Inquiry may also wish to note that my approval is also required for the appointment, remuneration, terms and conditions and pension arrangements for the Commissioner's staff and for the sums that the Commissioner may charge for services. In respect of the Commissioner's charging for services, the requirement for the Commissioner to seek my approval is being removed by the Protection of Freedoms Bill currently completing its progress through Parliament.

22. The ICO currently employs 353 staff and is funded by two streams of income. Data protection work is funded by notification fees paid by data controllers, and freedom of information work is funded by a grant-in-aid from the Ministry of Justice. The total combined income for 2012-13 will be nearly £20 million.

Question 3. The Inquiry would be grateful for an understanding of how these responsibilities work in practice. In particular, we would like the clearest possible picture of how you manage press relationships in relation to the formulation and execution of policy impacting on the media. How are the views of the press received, and then tested? How, if at all, does that differ from the way that the views of other parts of the media industry, and other stakeholders, are handled? How far is that process transparent or otherwise placed into the public domain? Do you or your officials schedule meetings or briefings with media representatives in relation to these matters, and if so with whom? Do any groups or proprietors have particular access to you or your department at these times? The Inquiry would be grateful if you could provide some specific, current or recent, examples.

23. As with all Departments, the Ministry of Justice has a Press Office which deals directly with the media on a day to day basis. It offers me, my Ministerial colleagues and officials handling advice and expertise on the full range of MoJ issues, as well as discussing these with the media. The aim of their work is to inform the public of policy and operational issues under my remit through the full range of media including print, broadcast, online, national and international outlets. Inevitably they also spend some time dealing with incorrect and misleading media reporting.

24. I engage in various ways with the media where they have an interest or are affected by the Department's policies. This can be by way of meetings at Ministerial level, or meetings between my officials and representatives of the media. These meetings will sometimes be complemented by correspondence, again either at Ministerial or official level, and sometimes by conversations with

my Special Advisers. The level of interaction will depend on the subject matter, but the media have no more involvement or access than any other stakeholder.

25. Public and targeted consultations will also usually be sent to media organisations where they have an interest in Government proposals. In this respect, the media are engaged as any other interested group would be, and their views and concerns taken into account and weighed against those of others.

26. The Ministry of Justice routinely publishes details of my meetings with senior media executives and organisations on its website in reports which detail gifts and hospitality received by Ministers, overseas travel and meetings with external organisations, located here: http://www.justice.gov.uk/publications/corporate-reports/moj). My exhibit KC/3, provided as part of this evidence, includes all relevant meetings I am aware of from my time as Lord Chancellor.

27. I provide some specific examples of how policy formulation in relation to the media has worked in practice in my answer to questions 4 and 5, below.

Question 4. In your experience, what influence have the media had on the content and timing of government decision-making on policy or operational issues affecting the media? Please provide some examples.

28. I have always sought to deal with the media on matters of policy affecting them in exactly the same way as I deal with other interested party or lobby group – namely to hear their arguments just as I would anyone else's, but to take decisions on the basis of the overall evidence, in which their views are balanced against those of others, put in the context of the analysis of my officials, and weighed against my own views and judgement.

29. Media proprietors, editors and publishers have an interest in policies that affect them, in just the same way that doctors, teachers and lawyers do. I would regard it as perverse to exclude them from correspondence, meeting and consultation – just as I would regard it as perverse to give excessive weight to their opinions, or consider their views in isolation from other views.

30. So, for example, I have met with broadcasters on the question of allowing the televising of certain court proceedings. There is a strong British media lobby for the UK to move towards an American-style system where court cases are substantially televised. I also meet regularly with the judiciary and representatives of the legal profession, who are rather more sceptical. Following consultation, I have set out my settled view, which is that full televising of courts would affect witnesses, victims and lawyers adversely and would therefore be harmful to the interests of justice. But I have accepted the case that televising judges' sentencing remarks could make a useful contribution to transparency in the courtroom and help demystify the process of justice.

31. I provide some examples below of how my interaction with the media on policy matters affecting them operates in practice. I have views on how policy in general (not just that affecting the business interests of the media) is made and announced with the media in mind, which I set out in response to questions 8 and 9.

Question 5. The Inquiry is interested in particular to understand in full detail the manner in which you have engaged with media interests in relation to the following specific policy matters:

a) current proposals to reform the law relating to defamation;

32. My officials have engaged with the media at a number of stages in the development of the proposed reforms to the law of defamation. Officials met media representatives for an informal consultation meeting in the summer of 2010 whilst we were developing provisions for inclusion in the draft Bill. Organisations represented at this meeting were the Guardian, the Times, the BBC, Associated Newspapers, News International, the Newspaper Society, the Media Lawyers' Association, the Society of Editors, the Publishers' Association, the Booksellers' Association, and Which?

33. This was one of a few informal discussions with interested parties held around this time. The Department also met with representatives of the legal profession, non-governmental organisations, internet organisations and members of the scientific and academic community.

34. The MoJ held a further round of consultation meetings following the publication of the draft Bill, in spring 2011, and again a meeting with the media representatives set out above was one of a series of meetings with interested parties. Media organisations were also among those we invited to respond to the formal public consultation on the draft Bill.

35. My officials met the Guardian, the BBC, and Which? again in early 2012 to discuss some of the specific provisions that were being developed for inclusion

in the substantive Defamation Bill. As before, they also held other meetings to take the views of other interested groups.

36. I detail in exhibit KC/3 my meetings with media proprietors, executives and senior journalists and defamation has on occasion come up. For example, I set out my early position at a lunch with the Society of Editors in June 2010. I have met Paul Dacre several times, and we discussed the issue briefly at a meeting in March 2011 where he stated that he was generally content with our already published proposals (see also my reply to question 8).

37. In terms of the influence that media representations on reform of defamation had upon me, I had arrived at a fairly settled view before I returned to office in May 2010 that the law needed reform to give further protection to responsible journalism, NGOs and scientific publication and to help address libel tourism. I don't believe media representations have had much sway on this one way or the other.

38. My goal in formulating the draft Bill has been to balance the need for greater freedom of expression with the ongoing need for individuals to be able to protect their reputations.

b) current proposals to reform the law relating to conditional fee arrangements ('CFAs');

39. There was a full public consultation on implementing the changes to the CFA arrangements recommended by Lord Justice Jackson between November 2010 and February 2011. Nineteen media organisations responded to our consultation on the reform of civil litigation.

40. In addition to the official-level meetings in summer 2010 and spring 2011 on the Defamation Bill mentioned above, I spoke at the Society of Editors' annual conference in November 2011. There has also been some correspondence between the Department, the Society of Editors and the Media Lawyers Association.

41. As above, I discussed CFA reform at a Society of Editors lunch in June 2010, and with Paul Dacre in March 2011.

42. In terms of influence, I understand that the previous government was intending to introduce the Jackson reforms for defamation and privacy cases only. On taking office, I immediately took the view that the Jackson reforms had much wider applicability and have proceeded ever since on that basis. But I agree with the argument that, as elsewhere, the costs are excessive in some CFA-funded media cases and it is my hope that – across the system – a reformed regime of CFAs will bring costs down.

43. During the passage of our Bill introducing our CFA reforms, I have heard concerns from some media lawyers and victims that these reforms will strengthen the hand of newspapers or others who have been involved in wrong-doing. But nothing in these reforms should prevent strong cases being brought. My view is that costs are so unbalanced at the moment that there is considerable scope for the system to be reorganised, without affecting the supply of legal firms ready and willing to take on well-founded actions against media organisations as we have seen recently, for example, in cases of 'phone hacking'.

c) the prospect of a Ministerial Order being made pursuant to section 77 of the Criminal Justice and Immigration Act 2008 to introduce custodial sentences for s.55 offences;

44. I have had no specific engagement with the media on this issue since taking office in 2010. However, my officials met the Society of Editors, Newspaper Society and Associated Newspapers in March 2011 to discuss a range of issues surrounding data protection, including the planned revisions to the EU data protection framework. This meeting also covered the matter of the penalties and defence available under section 55 of the DPA and the Government's position was set out that the matter was being kept under review, but that there were no plans to make an order under section 77 of the Criminal Justice and Immigration Act 2008 or commence the enhanced defence in section 78 of the same Act. I may have confirmed the position at one of my meetings with Paul Dacre.

d) implementation of changes to the law on bribery.

45. Before implementing the Bribery Act 2010, and issuing guidance under section 9 of the Act, my Department undertook a formal consultation exercise. We received formal representations from News International, the Newspaper Society, Press Association and Society of Editors asking for a media public interest defence to protect journalists who make payments for stories where justified in the public interest. The Society of Editors raised it when I met them in June 2010. Paul Dacre also raised this issue at one of my meetings with him and in writing. I did not proceed with this for the key reason - set out in more detail in Annex B – that any decision by the authorities to prosecute already has

to be in the public interest and that an additional defence was therefore unnecessary.

46. During the consultation period and in the run up to implementation journalists I met would occasionally mention the Act and I met Lord Rothermere in January 2011 specifically to discuss the proposals in more detail - and was again pressed on the point. But I reiterated my position that a specific public interest defence was unnecessary and that I had heard nothing to persuade me otherwise.

47. I generally take the view that the press should be bound by the law like anyone else. But I do not rule out the possibility that there will be occasions where they will need to break the law to expose a crime or serious misdemeanour that would not otherwise be uncovered. That law-breaking could – rarely - potentially include acts of bribery. In those circumstances, I believe we should rely on the good sense of the authorities to recognise that proceeding with prosecution would not be in the public interest – as they did in the case of MPs' expenses. I don't generally support specific public interest defences which run the risk of being used creatively to defend more questionable behaviour – for example, illegality in pursuit of matters that are not genuinely of public concern like prurient stories about celebrities.

48. The media interests that I engaged with on this issue generally accepted my position with good grace. Certain sections of the media did, however, campaign against commencement of the Act more generally claiming it would be bad for business and that it would bring an end to corporate hospitality (especially at events such as Wimbledon or the Olympics). However, when implementation came in July 2011 the coverage was balanced and reasonably positive.

Question 6. Based on your experience of sponsoring or observing the passage through Parliament of legislative measures affecting the interests of the media, what in your opinion is the risk that a measure introduced into parliament to give effect to government policy on press regulation would in itself provide an unwarranted opportunity to parliamentarians to restrict the freedom of the press contrary to the public interest? How would any such risk be best managed?

49. I do not believe this is a serious risk. Though it is true many Members of Parliament are concerned about the power and behaviour of sections of the media, concern to protect freedom of expression and the ability of the media to hold power to account remains central to the beliefs of the vast majority of individuals in both Houses.

50. This was the subject of most of my comments to the Society of Editors in November 2011 where I argued that there was little appetite for statutory regulation of the media.

Question 7. The Inquiry has heard evidence from the current and previous Information Commissioners about the limitations of the capability of the ICO to affect the culture, practices and ethics of the press in relation to the obtaining and processing of personal data - whether as a matter of available powers and functions, of resources, or of operational priorities. We would like to understand your perspective on these matters. What do you see as the current strengths and weaknesses of the ICO's position and performance in this respect? Do you consider there to be potential as matters stand for the ICO to do more to address public concerns about unlawful or unethical processing of personal data by the press? What, if any, changes to its capability might be desirable in this respect? What role might be envisaged for the ICO in any new approach to a regulatory framework relating to the press? Please set out your thinking in full.

51. I do not have a strong set of views on the role of the ICO, and wider policy thinking in my Department is still being developed.

52. This is in part because the functions and funding of the Information Commissioner and his office are under consideration in a number of ways. For example, Post Legislative Scrutiny of the Freedom of Information Act 2000 will be looking at how that Act has been enforced since 2005, and we want to give proper consideration to the recommendations of the Justice Select Committee. Equally, provisions in the Protection of Freedoms Bill are strengthening his independence from Government in a number of ways, including the removal of requirements to obtain my approval for: certain codes of practice; charging for some services like hard copies of publications; and staffing matters like pay and recruitment.

53. It is also because we need to look again at the funding model. The European Commission published proposals earlier this year on data protection which will involve consideration of the Information Commissioner's powers and functions. Notably, the EU proposals do not require Member States to implement a notification system and this is a key mechanism by which the Information Commissioner's data protection work is currently funded. So any additional role for the ICO in respect of the press, whether in terms of complaints handling, education and enforcement work, would need to take into account how that work was to be paid for.

54. On the ICO's role in any new regulatory framework for the press, I would point out that the EU proposals as drafted also require Member States to provide derogations for journalism and free speech and, as noted in Annex A, the Information Commissioner's powers with respect to the media have hitherto been relatively limited in relation to data protection. The proposed EU overhaul of the data protection framework provides us with an opportunity to reconsider this, but the negotiations are at an early stage.

55. With regard to the sentencing powers available to the Courts for offences committed under section 55 of the Data Protection Act 1998, I am keeping this matter under review. But given the Inquiry's terms of reference specifically refer to the data protection regulatory landscape, it appears to me to be right to await its outcomes before considering whether to take any action in this area.

General questions about engagement with the press

Question 8. Please explain the approach you personally have taken over the course of your career to engaging with media proprietors and senior editorial and executive staff within the media. In relation to your tenure of your current position in Government, your answer should include at least the following - indicating as appropriate whether the information relates to that capacity or a private capacity:

a) the nature and frequency of contacts of this nature, whether formal or informal; please provide all available records of meetings and conversations, indicating
where possible who initiated them and the purpose and content of these occasions;
b) details of any relevant hospitality you have given, received or participated in;
c) the value of these interactions to you;
d) the extent to which political support by the media for any individual, party or policy is discussed at such interactions;
e) the extent to which the existence and nature of such interactions are or are not placed within the public domain and the reasons for that.

56. No individual can succeed in politics or deliver policy without communicating with the public, which means politicians necessarily develop relationships with journalists, who are key intermediaries. So throughout my career I have met with members of the parliamentary lobby and other journalists covering departments in which I have been a Minister.

57. But, as my diaries since returning to office testify (relevant dates are provided with this statement as exhibit KC/3, including supporting meeting notes where available) I meet proprietors, executives and senior editorial staff relatively rarely. I have had few meetings with such people in my career except, of course, when I was a Non-Executive Director of Independent News and Media when my contacts involved the business of the company but not the political content of the newspaper. The editors of that Company's titles internationally were free of proprietorial control and I strongly supported this position.

58. I have met with Evgeny Lebedev twice since taking office (plus once at a dinner), at his instigation – primarily to discuss the climate for the newspaper business, particularly drawing on my experience as a board member on the Independent. Our political discussion was general and did not address media issues.

59. I have met Paul Dacre around five times since taking office – generally at the joint instigation of his senior executives and my Special Adviser. We had wide-ranging discussions covering day-to-day politics in general, and changes to defamation and bribery laws. We also had some contact concerning Freedom of Information and the 30-year rule relating to historical documents, where he led a Review instigated by the previous Government that this administration subsequently implemented.

60. I have only met Rupert Murdoch twice, about twenty years ago. I offered to meet Rebekah Brooks upon my appointment as Lord Chancellor to discuss defamation and CFAs, issues she had raised in writing, but no meeting took place in the end, to the best of my recollection. We have briefly met since at Party Conference.

61. I met Richard Desmond at a business lunch in February 2011. Again, our discussion was general and did not address media issues.

62. I meet a lot of journalists at interviews, in the House of Commons and at the Party Conference each year. I occasionally have lunch with lobby correspondents and political correspondents.

63. The value of these interactions to me is that it is an opportunity to exchange views and explain Government policy to an influential group of people. I have never been invited to engage in horse-trading over policy. In my opinion, the notion that a politician could ever be confident of obtaining positive news coverage in exchange for a media-friendly policy is an obvious fallacy. The news media is partly sustained by a regular diet of stories about mishaps in Government and criticisms of Ministers who are deemed to have failed. Without them, the front pages would be strangely bare. Politicians should not delude themselves that they can obtain favourable coverage by currying favour with journalists.

64. When these meetings take place in my capacity as Justice Secretary, the purpose is to put across the Government's position, listen, test and (if necessary) challenge the positions of the media. That position can then be considered against the views of others. This is precisely the same approach I would take to representatives of the legal profession, the judiciary and any other interest group.

Question 9. From your perspective, what influence have the media had on the formulation and delivery of government policy more generally? Your answer should cover at least the following, with examples as appropriate:

a) the nature of this influence, in particular whether exerted through editorial content, by direct contact with politicians, or in other ways;
b) the extent to which this influence is represented as, or is regarded as, representative of public opinion more generally or of the interests of the media themselves;
c) the extent to which that influence has in your view advanced or inhibited the public interest.

65. As a long-serving Member of Parliament and member of successive Governments, I have seen an undeniable change in the way that Government decision-making has been influenced by how it will be received and reported by the media, especially noticeable since the 1992 General Election. A particular change has been a shift in the balance between the amount of attention given to weighing up Parliament's reaction to a Government measure and that given to considering how a measure will be played out in the media.

66. This is a result of a number of structural changes including: the rise of 24-hour media coverage; the import of US media management practices; the strength of single-issue pressure groups who themselves are highly conscious about how they interact with the media.

67. I do not subscribe to the conspiracy theory that media interests suborn the judgement of the Executive by horse-trading and deals. My concern is far more

the impact of an excessive emphasis on media presentation on the general climate in which policy is made.

68. As I believe we saw to great excess under the last government, an obsession with the next day's headlines can result in an administration becoming far too concerned with grabbing the headlines, carrying out briefings and formulating and announcing policies that will be welcomed in editorials but which have not been properly thought through. In this way, the short term benefit a Government can obtain via positive media coverage can sometimes come at the expense of more considered policy-making. And the Government will suffer medium and long term damage from its policy failures.

69. That is not to say, of course, that media reception should not be a factor for Governments to take on board – and an important one. Neither is there anything inherently wrong with journalists and politicians enjoying close working relationships, as long as standards of probity are maintained and the public interest is properly protected. Politics is about consideration and appraisal, but it is also about persuasion.

70. I believe that this Government should continue to strive to find a better balance between the effort spent on policy-making and that spent on presentation. A better balance will increasingly result in more sound policy-making and healthier relationships between the Executive and the media.

I believe that the facts stated in this witness statement are true.

RT HON KEN CLARKE QC MP

ANNEX A

Substantive Civil Law

The Inquiry has asked for information on the substantive civil law, relating to freedom of expression, privacy, defamation, freedom of information and data protection. This annex sets out the relevant law in this area and how it affects the media in particular. However, in specific cases, the media's business interests could be affected in different ways by other civil law, and this list cannot be exhaustive.

The Human Rights Act 1998

The Human Rights Act 1998 (HRA) enshrines the rights in the European Convention on Human Rights into UK law. The most relevant Convention rights that have a bearing on media activity are articles 8 ('Right to respect for family and private life') and article 10 ('Freedom of Expression').

Section 12 of the HRA also provides that the domestic courts should pay special regard to the right of freedom of expression in any case where it is in issue and to the public interest in disclosure of material which has journalistic, literary or artistic merit.

The Data Protection Act 1998

The Data Protection Act 1998 (DPA) requires data controllers to comply with eight data protection principles when they process personal data unless they are able to claim an exemption from one or all of them. Section 32 of the DPA provides an

exemption from some of the Act's requirements where personal data is processed only for the "special purposes" of journalism, art and literature. This applies where the processing is undertaken with a view to publication, the data controller reasonably believes that publication would be in the public interest, and compliance with the relevant requirements of the Act would be incompatible with the special purposes.

The Information Commissioner can take investigation and enforcement action under the DPA. Of particular interest to the media are special information notices which allow the Information Commissioner to ascertain whether data is not being processed only for the special purposes or with a view to publishing material not previously published. Although there are some requirements of the DPA that still need to be complied with when processing personal data for the special purposes, the DPA contains in section 46 a restriction on the Commissioner's ability to take action against any processing for the special purposes where the relevant material has not yet been published. However, he may give assistance to individuals who are pursuing their data protection rights through the Courts.

Section 55 (criminal offence)

Section 55 of the DPA makes the knowing or reckless obtaining, disclosing or procuring the disclosure of personal data without the consent of the data controller an offence. This could apply to journalists, or private investigators working on their behalf, but it also applies to (for example) bank workers and healthcare workers who obtain, disclose or sell personal data.

At present, anyone convicted of these offences is liable to a fine, but the power is available under section 77 of the Criminal Justice and Immigration Act 2008 (CJIA) to introduce custodial sentences of up to two years. At present the Government has no plans to do so. A defence exists for anyone who can show that they acted in the

public interest but an enhanced defence was inserted by the CJIA (as yet uncommenced) for anyone who can show that they acted: for the special purposes; with a view to any person publishing journalistic, literary or artistic material; and in the reasonable belief that what they did was justified in the public interest. The Government has no current plans to commence this provision.

(For more on the substantive criminal law in this area, see Annex B)

Freedom of Information and access to public information

The Freedom of Information Act 2000 (FOIA) provides a right of access to information held by public authorities. Because the media are heavy users of FOIA and their FOI requests have resulted in a large number of news stories, any change to the Act has an implicit impact on them.

For example, the FOIA allows the Secretary of State to make an order bringing such bodies that he considers perform functions of a public nature within the scope of the Act. Clearly, the range of bodies which are subject to FOIA impacts on the range of bodies to which the media can submit FOI requests. In addition, the Act allows for the Secretary of State to make Regulations about refusal of requests where the cost of complying would exceed a limit. He may also make regulations governing the fees that public authorities are permitted to charge for certain prescribed costs incurred in complying with requests.

The Inquiry may also wish to note that publicly-owned broadcasters, such as the BBC and Channel 4, are subject to the provisions of FOIA in respect of information held for purposes other than journalism, art and literature.

Time period for the release of historical records

The release of historical records under the Public Records Act 1958 (as amended), commonly known as the 'thirty year rule', tends to be a source of media coverage annually, particularly around the Christmas and New Year breaks.

The Government is working to reduce the time period after which historical records are released, from thirty years to twenty years. The Government's intention is that from 2013, two years of historical records will be released per year for ten years until the transition to a new twenty year rule is complete.

Defamation and the law of privacy

The media are affected by the civil law in relation to defamation and the law of privacy insofar as they must have regard to the law in these areas in selecting stories for publication. Where the media have acted in such a way as to defame somebody or unduly invade a person's privacy, they can be subject to a civil action for damages.

ANNEX B

Substantive Criminal Law

The Inquiry has asked for information on the criminal law relating to unlawfully obtaining of information, whether for payment or otherwise, and the availability of public interest defences. This note focuses on the offences which are likely to be of most relevance, other than that in section 55 of the Data Protection Act 1998 (see Annex A). Much will obviously depend on the circumstances and this account cannot be exhaustive.

Persons obtaining information

It is an offence under section 2 of the Fraud Act 2006 for a person dishonestly to make a false representation (including as to their identity) with the intention of making a financial gain or causing someone else a loss. The maximum penalty is 10 years' imprisonment. A company can also commit this offence, and a company officer can be liable for an offence committed by the company if the offence is committed with the consent or connivance of a director, manager, secretary or other similar officer of the body corporate, or a person who was purporting to act in any such capacity.

Section 6 also includes wide offences connected with possessing articles for use in connection with fraud. The maximum penalty is 5 years' imprisonment.

Unlawful and intentional interception of communications is an offence under section 1 of the Regulation of Investigatory Powers Act 2000. This covers public postal services and public telecommunications systems. The maximum penalty is two years' imprisonment (prosecutions require the consent of the Director of Public

Prosecutions). This offence can also be committed by a company, and company officers may be liable in the same way as fraud – though here also where the company's offence is committed with the neglect of a relevant officer (section 79).

Where interception is authorised, there are related offences designed to ensure the information secured is kept confidential to those authorised to have it (section 19).

Unauthorised access to any program or data on a computer is an offence under section 1 of the Computer Misuse Act 1990. Here too the maximum penalty is two years' imprisonment. It is a further offence to commit that offence with the intention of committing or facilitating a further serious offence, including fraud (section 2). The maximum penalty in such cases is five years' imprisonment. There is no express provision for companies to commit these offences.

There are various impersonation offences, including impersonation of a police officers (Police Act 1996, section 90(1)), and making false documents or other instruments with the intention of making someone believe they are real may be an offence under the Forgery and Counterfeiting Act 1981.

Persons providing information

Misconduct in a public office is an offence at common law. It could apply to any public officer who by providing information wilfully neglects their duty or misconducts him or herself and so abuses the public's trust. "Public officer" includes, but is not limited to, police officers. The maximum penalty is at large.

If a financial or other advantage is given in return for improperly performing functions, then both the giver and receiver may commit a bribery offence. Similar offences

apply in relation to acts done before the Bribery Act 2010 came into force, including corruptly accepting money or other advantage, under section 1 of the Prevention of Corruption Act 1906. The maximum penalty for that is seven years' imprisonment. The 2010 Act makes particular provision for commercial organisations who fail to prevent bribery committed for their benefit (section 7).

Since the implementation of the Act in July 2011, the media has been most interested in a proposed amendment to protect journalists who make payments for stories where this is justified in the public interest. However, it remains for the prosecuting authorities to consider whether the public interest requires a prosecution in any particular case (as well as whether the evidential requirements, e.g. under the Code for Crown Prosecutors, are met). The Director of Public Prosecutions or the Director of the Serious Fraud Office must personally consent before a prosecution can proceed.

The Officials Secrets Acts include various offences relating to damaging disclosures by a person who is or has been a Crown servant or contractor. Another person who later comes into possession of such information may themselves commit an offence in some cases if they then disclose it (Official Secrets Act 1989, section 5).

Secondary participation and inchoate offences

A range of offences may also be committed by anyone who knew that any of the above offences were being committed and, e.g., assisted or encouraged its commission, or was part of a conspiracy to commit it. For example, under section 1 of the Criminal Law Act 1977 it is the offence of conspiracy to agree with another person to carry out a course of conduct which will involve the commission of an offence. A company can be convicted of conspiracy (provided there was not just one

responsible person). Penalties generally the same as for the person who committed the principal offence.

It is an offence under section 44 of the Serious Crime Act 2007 (in force since April 6 2008) to do an act capable of encouraging or assisting the commission of an offence, intending to so encourage or assist. It is also an offence to counsel (advise or solicit) or procure (by endeavour) the commission of any indictable offence (e.g. fraud) under section 8 of the Accessories and Abettors Act 1861, or a summary one (under section 44 of the Magistrates' Courts Act 1980). Someone convicted may be tried and punished as a principal offender.

Defences

The statutory offences are not generally subject to an express defence in relation to the public interest. Public interest factors will be taken into account in making decisions in relation to prosecution where there is otherwise sufficient evidence.

Common law defences could apply in principle (such as duress or necessity), though that seems unlikely in fact. There is no defence of following superior orders.

The common law offence of misconduct in a public office is subject to a defence of reasonable excuse or justification. There are lawful authority exceptions to certain official secrets offences, and commercial organisations have an adequate procedures defence to a charge under section 7.

The Director of Public Prosecutions published interim guidance for prosecutors on assessing the public interest in cases affecting the media on 18 April 2012.